

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAR LEE GRAY,

Defendant-Appellant.

UNPUBLISHED

September 17, 2002

No. 232991

Ionia Circuit Court

LC No. 00-011814-FH

Before: Murphy, P.J., and Hood and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault of an employee of a place of confinement, MCL 750.197c. He was sentenced as an habitual offender, fourth offense, MCL 769.12, to fifty-eight months to fifteen years' imprisonment. We affirm.

After taking a shower, defendant, a prisoner at the Ionia facility, was being escorted by two guards back to his cell. Defendant's hands were chained behind his back, and his ankles were also chained. Defendant spit on Officer Diane Coggins. Coggins and Officer John Canterbury attempted to guide defendant toward his cell. Defendant shoved Coggins into the wall. The officers attempted to take defendant down toward the floor on his stomach. Defendant was able to lie on his back and kick at the officers. Coggins' hand got caught in the chains, and she suffered injury. Additionally, she was kicked in the chest and face. Two officers came to the scene to assist, Officer Chris Ballinger and Sergeant Dale Wakley. The four officers were able to place defendant in his cell, although he continued to resist. Defendant testified that, following his shower, Coggins put the restraints on too tight. When he complained, she told him to be quiet and go back to the cell. Defendant told her that he would file a grievance against her. The officers "took him down," although he had done nothing wrong. Defendant denied spitting or kicking the officers.

Prior to the close of proofs, the trial court delineated the anticipated instructions and acknowledged receipt of the prosecutor's theory of the case. The trial court indicated that it would allow defense counsel the opportunity to "put together a theory of the case or otherwise." There is no indication that defense counsel submitted a theory of the case or objected to the timeliness of the prosecutor's submitted theory of the case.

On appeal, defendant challenges the submission of the prosecutor's theory of the case to the jury. Specifically, defendant alleges that the trial court abused its discretion by reading the

prosecutor's theory of the case, although it was untimely under the court's scheduling order. Defendant further alleges that trial counsel was ineffective for failing to object to the prosecutor's theory of the case and failing to submit defendant's theory of the case after invitation by the trial court. We disagree. To establish a claim of ineffective assistance of counsel, the defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness and was so prejudicial that the defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the presumption that the challenged action was trial strategy and also establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The issue of whether a defendant has been denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

Trial counsel did not err by failing to request an instruction on his theory of the case. *People v Barr*, 156 Mich App 450, 466; 402 NW2d 489 (1986). Defense counsel presented his theory of the case in closing argument; specifically, that the case had not been proved beyond a reasonable doubt because of the inconsistencies in the witnesses' testimony. *Id.* Defendant has failed to meet his burden of proof in demonstrating ineffective assistance. *Hoag, supra.* The trial court instructed the jurors that the arguments of counsel were not evidence, but only designed to help the jurors understand the theory of the case. The trial court also advised the jurors that the case should be decided by the jury by evaluating the evidence, not based on any perceived opinion about the judge's comments or statements. At the hearing regarding the motion for a new trial, the trial court concluded that *if* error had occurred, it was harmless error to instruct regarding the prosecutor's theory of the case when defense counsel had not submitted a theory of the case. The trial court concluded that it was clear to the jury that the theory of the case was submitted by the prosecutor and was not an expressed opinion by the trial court. The trial court also concluded that the failure to submit a defense theory was trial strategy. We cannot conclude that these findings were clearly erroneous. *LeBlanc, supra.* Accordingly, defendant's claim, premised on theory of the case error, is without merit.

Defendant next alleges that the trial court committed reversible error by sentencing defendant as an habitual offender, fourth offense, when one of the convictions to support the enhancement was committed in Wayne County, not Oakland County, as listed in the complaint and information. We disagree. The trial court did not err by granting the prosecution's motion to amend the information. *People v Hardiman*, 132 Mich App 382, 385-386; 347 NW2d 460 (1984). Furthermore, defendant admitted to the conviction at trial, MCL 769.13(5)(d), and the conviction venue was properly identified in the presentence report, MCL 769.13(5)(c). Accordingly, defendant's claim of prejudice is without merit. See *Hardiman, supra.*

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Christopher M. Murray